

IN THIS ISSUE

- *Proposed Great Lakes Agreement Has Potential for Broad Impact Throughout Wisconsin*
- *A Texas Zoning Case of Transcending Interest*
- *Court Upholds Municipal Liability in Contractor Case*
- *Courts Disagree on Meaning of "Public Use" in Eminent Domain*
- *Speakers' Forum*

Proposed Great Lakes Agreement Has Potential for Broad Impact Throughout Wisconsin

On July 19, 2004, the Council of Great Lakes Governors released its draft of the "Great Lakes Basin Sustainable Water Resources Agreement" and the draft of the "Great Lakes Basin Resources Compact". These documents are intended to implement discussions between the States and Canadian provinces regarding when and how water from the Great Lakes basin may be withdrawn.

These proposed agreements are important to all communities in Wisconsin, not just communities in the Great Lakes basin. The agreements specifically deal with withdrawals from the Great Lakes ***and*** withdrawals of groundwater from the Great Lakes basin. But, for states such as Wisconsin, where part of the state is within the basin and part outside the basin, there is a question about whether the state would create one regulatory scheme for areas within the basin, and another regulatory scheme for areas outside the basin—or whether the state would apply the regulations applicable to the Great Lakes basin throughout the entire state. Because that is a real possibility, it is important that all communities be aware of what these proposed agreements say. A copy of these drafts can be obtained from the Council of Great Lakes Governors website, www.cglg.org.

The proposed agreements apply to "withdrawals" from the Great Lakes themselves or from surface water or groundwater located within the Great Lakes Basin. The term "withdrawal" is defined very broadly. Other important terms in the agreements are "diversion" and "consumptive use". A "diversion"

is defined as a transfer of water from the Great Lakes Basin into another watershed. A "consumptive use" is defined as that portion of water withdrawn from the Great Lakes Basin that is lost or otherwise not returned to the basin due to evaporation, incorporation into products or other processes.

New (or expanded) diversions over an average of 1 MGD in any 120 day period would require ***unanimous*** approval from the regional body proposed to be formed. The reason for using the 120 day average is to exempt most agricultural uses.

New or increased consumptive uses over an average of 5 MGD in any 120 day period also require approval from the proposed regional body. This approval does not need to be unanimous, but requires that not more than two members of the regional body disapprove.

Other diversions, and other withdrawals—including groundwater withdrawals—greater than 100,000 gallons per day average in any 120 day period, need state, not regional body, approval. While state approval for these types of withdrawals is not new, the standards that would apply to these type of withdrawals would be. Also note that these standards would not apply to agricultural withdrawals that do not meet the 120 day average number.

The proposed agreements sets forth standards for regional body and state approval. For regional body approval, these standards may be a step forward. Previously unanimous approval was needed for a new diversion, and there

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(Continued from front page)

were no standards for evaluating a request. This essentially gave any state the ability to veto a diversion requested by another other state. The proposed agreement establishes standards for making a determination on whether a diversion or consumptive use request should be granted.

However, for those withdrawals subject to state approval, the proposed agreement would set new requirements that go significantly beyond current law. This agreement could have a significant impact on those users.

The requirements for approval (applicable to both regional body and state approval) include the following:

- There is no reasonable water supply alternative to the new or increased withdrawal within the basin in which the use will occur.
- The withdrawal is limited to quantities considered reasonable for the proposed purpose.
- All water withdrawn from the basin will be returned to the basin less an allowance for consumptive use. The proposed agreement also expressed a preference that water withdrawn from a watershed of a stream that is a direct tributary to a Great Lake be returned to the watershed of that tributary stream.
- The withdrawal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of the Great Lakes Basin. Remember that this broad provision was proposed, but not included, in Wisconsin's recently adopted groundwater quantity legislation. Municipal organizations and other water users had significant concerns about such an ambiguous requirement.
- A withdrawal needing regional approval must incorporate a conservation plan, demonstrating how environmentally sound and economically feasible water conservation measures will be implemented to minimize withdrawals or consumptive use. A withdrawal proposal needing state approval must show that environmentally sound and economically feasible water conservation measures will be implemented to minimize withdrawals or consumptive use.
- A withdrawal needing regional approval or a diversion of any size must show that there will be an improvement to the waters and water dependent natural resources of the Great Lakes Basin. An improvement is not required for a withdrawal just needing state approval.

The Council of Great Lakes Governors is accepting comments on the draft proposals until October 15, 2004.

If the agreement is signed, each signor is to seek legislative, regulatory or other changes that would be required to give effect to the agreement. Whether such legislation would pass in Wisconsin is unknown. Until such legislation is passed, however, actual provisions of the agreement regarding review of withdrawals by the state would not be effective.

—*Lawrie J. Kobza*

A Texas Zoning Case of Transcending Interest

A Texas Supreme Court zoning decision issued in the spring of this year weaves together issues of vested rights, estoppel and takings, and illustrates how facts influence doctrine.

Glenn Heights, Texas, grew in population by 76% between 1990 and 2000 and by another third by 1995. Significant amounts of undeveloped lands were zoned for residential densities in the range of five to six homes per acre, consistent with the City's land use plan.

A new plan in 1995 took the policy stance that growth should be slowed and that too much land was zoned for too many housing units. Following that plan, several of those vacant over-zoned areas were downzoned for lower densities of housing.

An experienced local development company was able to enter into a purchase contract for one of the areas zoned for higher density housing that had not had its zoning densities reduced as part of the 1995 planning effort. The contract purchase price was a bargain, due to the seller being a foreign firm having a fire sale of its American holdings.

The development company then conducted due diligence, asking the City officials if the zoning was likely to change. City officials said they could give no guarantees, but they saw no change on the near horizon.

The developer then closed on purchasing the lands. Within a few weeks, the City placed a moratorium on the parcel and other parcels that had been left out of the earlier rezonings to reduce allowable residential densities. The initial 30-day moratorium was extended multiple times and ran for a total of 28 months, when the property was finally downzoned to a district allowing half as many units as the original zoning.

The developer sued the city alleging a regulatory taking. The developer won at the trial court, gaining an award of \$485,000 (the reduction in property value caused by the 50% cut in allowable densities), and at the Texas Appeals Court, but lost at the Supreme Court.

The Supreme Court applied customary takings analyses. First, the court asked if the downzoning was motivated by substantial governmental interests. The court concluded that it was, based on the evidence of the benefits of growth management. The court then considered the extent of the developer's economic loss. Here, the adjudicated loss to the developer was a 50% reduction in the value of the real estate. However, this was still a substantial gain over the bargain basement price the developer had paid for the property. That price

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was a legitimate factor to consider, said the Court.

The next issue and the one that one commentator says gives the case "significance transcending state borders," is whether the developer was treated fairly by the City. (See Terry D. Morgan, *Downzoning in Texas*, 56 *Planning and Environmental Law* 3 (2004)). On this issue, the City drew the ire of the justices of the Supreme Court. They felt that the developer had played fairly, looking at the City Plan, the long standing zoning, interviewing appropriate City officials on the likelihood that the zoning would remain. The City knew what the developer intended and waited until after the developer closed on the purchase before lowering the boom of the moratorium. The City then stretched out its moratorium. Some evidence showed that the City was waiting, not for studies, but for the votes to be marshalled to adopt the downzoning. In blunt terms, the Supreme Court's decision says the developer was "blindsided" by clearly faulty City procedures.

Nonetheless, the Supreme Court of Texas reversed the earlier court decisions, based on three considerations:

First, this developer was not singled out. During the moratorium, the City also looked at other tracts zoned for higher density to see if they too should be downzoned.

Second, in this unique circumstance, the developer had paid so little for the land that even a half a loaf of density allowance yielded a respectable profit.

Third, the court deemed the City's treatment of this developer was not materially different from zoning decisions made by cities every day. The underlying signal to the developer being, "grow up." According to the Texas court, this is the reality of the politicized local land use process. If you enter this arena, you have to expect restrictions and reversals of position. In Texas, rights to approval vest only when a plat application is filed, not when lands are purchased.

Sheffield Development Co. v. City of Glenn Heights, 47 *Tex.Sup. J.* 327, 2004 WL 422594 (March 5, 2004).

— Richard A. Lehmann

Court Upholds Municipal Liability in Contractor Case

According to a July 29th decision of the Wisconsin Court of Appeals, municipalities may be liable to unpaid subcontractors if prime contractors fail to obtain payment and performance bonds, despite 1997 revisions to applicable statutes. Furthermore, the twenty-day statute of limitations applicable to lien claims for public projects is inapplicable in such cases.

In *Holmen Concrete Products Co. v. Hardy Construction Co., Inc.*, Appeal No. 03-335, the Village of Readstown was held responsible for unpaid payments owed by a prime contractor to two subcontractors for work on a public project. Because Readstown breached its statutory duty by failing to ensure that the prime contractor secured a payment and performance bond, the Village was liable for damages to the subcontractors.

Readstown argued that the Wisconsin Legislature revised sec. 779.14 in 1997, and removed the duty of municipalities to ensure that prime contractors obtain payment and performance bonds. However, the court of appeals disagreed, and held that *Cowin & Co., Inc. v. City of Merrill*, a 1930 Wisconsin Supreme Court case holding that municipalities have a duty to ensure that contractors secure payment bonds remains the rule. Reasoning that nothing in the 1997 legislative history suggested an intent to terminate this duty and that statutes still require municipalities to approve payment and performance bonds, the court concluded that the legislature did not intend to alter municipal duties. Moreover, the court noted that requiring municipalities to ensure that payment and performance bonds are obtained is good public policy because it protects both the subcontractor and the municipality should a prime contractor become unable to pay. Thus, despite alterations to the statute, municipalities remain liable for failing to ensure payment and performance bonds.

Additionally, the court concluded that a twenty-day statute of limitations does not apply to claims for failure to ensure that contractors obtain a payment and performance bond. Readstown contended that the plaintiff's claim was barred under Wisconsin Statute Section 779.15(4)(a), which requires that lien claims on funds held by a public owner on a public project be brought within twenty days of notification. However, the court held that a lien claim and a claim for failure to ensure a bond are separate causes of action. Therefore, because §779.15(4)(a) applies only to lien claims, it is inapplicable to claims for failure to ensure that a payment and performance bond is secured, and plaintiffs are not bound by a twenty-day statute of limitations.

Holmen Concrete Products Co. v. Hardy Construction Co., Inc. reinforces the importance of ensuring that contractors secure payment and performance bonds. Public works contracts generally require payment and performance bonds although a letter of credit may be substituted for certain smaller dollar projects. Municipalities that fail to ensure that proper bonds are in place, may be liable for substantial payments to subcontractors. Accordingly, municipalities should revisit their existing procedures to verify that appropriate mechanisms are in place to ensure that all contractors obtain the required payment and performance bonds.

This decision is expected to be published in the official reports.

— James E. Bartzan

Courts Disagree on Meaning of “Public Use” in Eminent Domain

Does the promise of jobs and increased tax base justify taking private property by eminent domain and then turning it over to other private parties for development?

The Supreme Courts of Connecticut and Michigan each faced this question recently. On similar facts, they reached opposite conclusions. Their differing analyses are instructive on an issue that is not yet settled in Wisconsin.

The Connecticut and Michigan Cases

Both the Connecticut and Michigan cases involved large scale redevelopment plans. In Connecticut, the City of New London sought to replace 90 acres of existing residential and commercial uses with a hotel and conference center, marinas, new housing, a technology park, and office and retail space. In Michigan, Wayne County proposed redeveloping 1,300 acres into a business and technology park. New London expected its project to create 1,000 jobs. Wayne County projected 30,000 jobs from its plan. Both local governments expected significant gains in tax base.

However, New London and Wayne County each had difficulty implementing their plans due to “hold outs” -- individual owners who refused to sell at the offered price. When negotiation failed, the local governments initiated condemnation proceedings.

The owners challenged the condemnation proceedings on the ground that the local governments lacked authority to condemn their property. The owners noted that the Michigan and Connecticut constitutions, as well as the Fifth Amendment to the U.S. Constitution, allow private property to be taken through eminent domain only for a “public use.” The owners charged that taking their property only to allow others to develop it does not meet this public use requirement.

The Connecticut Supreme Court disagreed. It indicated that it would take a deferential view toward the City’s determination of what constituted a public use:

Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. . . . Thus, if a legislature, state or federal, determines there are

substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

Applying this deferential standard, the court found that an economic development plan that a municipality reasonably determines will promote significant municipal economic development constitutes a valid public use of the eminent domain power. By contrast, if “the facts and circumstances of the particular case reveal that the taking was primarily to benefit a private party,” then the court would rule the taking unconstitutional. The Court ruled that the City of New London redevelopment plan satisfied the constitutional standard.

In support of its decision, the Connecticut Supreme Court cited the Michigan Supreme Court’s landmark decision in *Poletown Neighborhood Council v. Detroit*, decided in 1981. In that case, the Michigan court held that the City of Detroit’s condemnation of the Poletown neighborhood to establish a site for a General Motors plant constituted a taking of private property for public use. Ironically, the Michigan Supreme Court expressly overturned the *Poletown* decision just a few months after the Connecticut court cited it when the Michigan court ruled on Wayne County’s redevelopment plan..

The Michigan Supreme Court, interpreting only its state constitution, found that Wayne County’s redevelopment plan did not meet the public use requirement. It observed that when Michigan adopted its current state constitution in 1963, the phrase “public use” was understood to allow private land to be transferred by a condemning authority to a private entity only in three narrow circumstances. First, such a transfer could occur when “public necessity of the extreme sort” requires collective action:

A corporation constructing a railroad, for example, must lay track so that it forms a more or less straight path from Point A to Point B. If a property owner between points A and B holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is halted unless and until the railroad accedes to the property owner’s demands. And if owners of adjoining properties receive word of the original property owner’s windfall, they too will refuse to sell.

Thus, the use of the eminent domain power is appropriate to make possible the development of railroads, gas lines, power lines, etc., all of which deliver

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public benefits as “instrumentalities of commerce.”

Second, land may be condemned for the benefit of another private party when the property remains subject to public oversight after transfer to the private entity. Thus, private utilities may be the recipients of such property where their use of the property is subject to regulation by the public service commission.

Third, condemned property may be transferred to a private party where the property is selected because of “facts of independent public significance,” rather than the interests of a private entity. As an example, the court cited the condemnation of blighted property, which advances a public health and safety interest. The subsequent resale of the land to a private party is “incidental” to the public purpose behind the action.

The Michigan Supreme Court thus faulted the 1980 *Poletown* decision for approving a use of the eminent domain power that went beyond the understanding of the framers of Michigan’s constitution.

Poletown’s “economic benefit” rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, “megastore,” or the like.

Applying its newly announced standards, the Court held that Wayne County was not taking the defendants’ property for a “public use.” It noted that office parks are commonly developed without the exercise of the eminent domain power. Thus, government involvement in the land assembly process was not a necessary element. Nor would there be any governmental oversight over the use of the property after it was sold. Thus, there was no assurance that “the businesses that would occupy what are now defendants’ properties will continue to contribute to the health of the local economy.” Finally, the *act* of condemning the defendants’ properties would not, in and of itself, yield a public benefit, as it would if the properties were blighted.

The Implications for Wisconsin

The Wisconsin courts have not clearly adopted a position on this issue. In *Grunwald v. Community Development Authority*, 202 Wis. 2d 471, 551 N.W.2d 36 (Ct. App. 1996), the Court of Appeals approved the condemnation of a nonblighted property on the ground that its condemnation was necessary to allow the redevelopment of other blighted property. Thus, it is not clear whether jobs and tax base alone might justify the exercise of eminent domain powers, or if the elimination of blight was a necessary element in the *Grunwald* case. Nevertheless, the Court took a deferential view toward

the condemning authority’s determination of public use, suggesting the Court may be more likely to adopt Connecticut’s analysis of the issue than Michigan’s.

A recent Wisconsin Supreme Court case leads to the same conclusion. *Town of Beloit v. County of Rock*, 2003 WI 8, 259 Wis. 2d 37, 657 N.W.2d 344, involved a dispute over whether the Town of Beloit’s development of a subdivision served a public purpose. The Court held that the Town had acted for a public purpose because it developed the subdivision in order to create jobs, expand the local tax base, promote orderly growth, and protect the environment (due to a restrictive covenant the Town proposed to impose on certain river-front lots).

The Court’s approval of the Town’s action suggests that it would approve as a “public use,” the transfer of condemned property to private parties provided that the transfer is conducted to create jobs and improve the tax base. However, *Town of Beloit* did not involve the exercise of the powers of eminent domain. Rather, it concerned the limitation of governmental power under the public purpose doctrine. The Supreme Court stressed that “public use” for eminent domain purposes might be given a different meaning than “public purpose” under the public purpose doctrine.

The Michigan decision, *County of Wayne v. Hathcock*, is based solely on Michigan law, and therefore has no application outside Michigan. The Connecticut decision, *Kelo v. City of New London*, is based on both the state and federal constitutions. The property owners in *Kelo* have filed a petition for review with the U.S. Supreme Court. If the Court accepts review, it will rule based on the U.S. Constitution. Obviously, such a ruling would apply in Wisconsin as well.

—Matt Weber

SPEAKERS' FORUM

October 7, 2004 — Madison

October 8, 2004 — Milwaukee

**State Bar Annual Real Estate Update —
“Smart Growth”**

Richard A. Lehmann

October 15, 2004

Land Use Law Seminar —

**“Consistency Between Comprehensive Plans
and Land Use Actions”**

Madison, WI

Richard A. Lehmann

October 28, 2004

Stormwater Utilities Overview and Update

League of Wisconsin Municipalities Annual Conference

La Crosse, WI

Lawrie J. Kobza

MUNICIPAL LAW NEWSLETTER

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the Boardman attorneys listed below who are contributing to this newsletter.

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